



Karen Payne
Inspector-General of Taxation and Taxation Ombudsman
GPO Box 551
Sydney NSW 2001

Dear Karen,

Re: Review on the Administration of the Commissioner's Remedial Power

We welcome the finalisation of your review of the administration of the Commissioner's Remedial Power (CRP) and thank you for the opportunity to provide a response to the final draft of your report.

We are pleased that your report does not identify any significant systemic concerns around the ATO's administration of the CRP. Since its enactment, the Commissioner has sought to administer the CRP robustly and with integrity. The CRP is a relatively unique power that permits the Commissioner to modify the operation of the primary law. The Parliament deliberately enacted strict statutory criteria governing its exercise. The fact that none of the legislative instruments made by the Commissioner pursuant to the CRP have been disallowed reflects the appropriate and measured approach the Commissioner has taken to its exercise.

That said, while the CRP has only been exercised on 7 occasions, the ATO has found it to be a useful tool to resolve unintended consequences arising from taxation laws. A recent example of this was the *Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023*. By making that determination, we were able to quickly resolve an unintended consequence of legislative amendments made in 2022, to ensure that certain individuals could continue to claim a deduction for their personal superannuation contributions.

We appreciate the recommendations made in the report directed to improving some aspects of our processes. We also recognise that greater awareness and understanding of the CRP and how it operates may result in a greater number of issues being identified as suitable for resolution via the CRP. We look forward to continuing to build on our strong administration of the CRP, with the benefit of your recommendations.

We acknowledge that there remain differences in our respective views about the extent to which the ATO can 'rescope' the issues presented by CRP candidates to overcome advice from the Department of the Treasury that a proposal would not have a negligible budget impact.

Our detailed response to your recommendations is attached, and we value the insights you have provided via these recommendations and your comprehensive report.

Finally, we would like to acknowledge the efforts of everyone involved in undertaking this review, and thank you and your team for the collaborative and professional way the review was undertaken.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Kirsten Fish', written over a faint, light-colored circular stamp or watermark.

Kirsten Fish

Second Commissioner of Taxation

6 November 2023

IGTO Review – The Administration of the Commissioner’s Remedial Power

ATO responses to IGTO final draft report recommendations

Final Draft Report Recommendation	ATO Response
<p>Recommendation 3.1</p> <p><i>The IGTO recommends that the ATO consider additional channels and opportunities to:</i></p> <ul style="list-style-type: none"> <i>a) communicate with stakeholders about the existence of the CRP, the process to request an exercise of the CRP, its purpose and how it can be utilised to address unintended consequences; and</i> <i>b) bolster community awareness through guidance and information, including that which is already published and available on the ATO website.</i> 	<p>Recommendations 3.1(a) and (b) – Agree</p> <p>The ATO agrees to consider additional channels and opportunities to communicate with stakeholders and bolster community awareness of the CRP.</p>

Final Draft Report Recommendation

ATO Response

Recommendation 3.2

The IGTO recommends that the ATO consider strategies to improve the level of staff awareness and understanding of the CRP and how it operates within the broader 3-step process for resolving unforeseen issues that may arise in the administration of tax law, particularly for ATO officers in CEG and LDP who engage frequently with taxpayers and tax practitioners.

Recommendation 3.2 – Agree

The ATO agrees to consider strategies to improve the level of awareness of the CRP amongst relevant ATO staff.

Recommendation 3.3

The IGTO recommends that the ATO consolidate and improve its system for capturing, tracking and reporting on the progress of CRP candidates, to reduce duplications and minimise the need for manual inputs and ensure that there is a complete record of relevant communications and deliberations for all CRP candidates.

Recommendation 3.3 – Agree

The ATO agrees to improve how it captures, tracks and reports on the progress of CRP candidates to streamline reporting and recordkeeping.

Final Draft Report Recommendation

ATO Response

Recommendation 3.4

The IGTO recommends that the ATO:

- a) develop guidelines or a set of criteria that clearly define the circumstances in which an approach or enquiry made to the CRP team is formally recorded as a CRP candidate for consideration and ensure there is a consistent treatment of all approaches made to the CRP team; and*
- b) provide periodic progress updates to CRP applicants, or alternatively, clearly inform CRP applicants that they can contact the ATO to receive progress updates if the ATO does not provide updates to CRP applicants automatically.*

Recommendation 3.4(a) – Agree

The ATO agrees to develop guidelines or criteria that clearly define the circumstances in which an approach or enquiry made to the PAL CRP team is formally recorded as a CRP candidate.

Recommendation 3.4(b) – Agree in part

The ATO agrees to inform the entity or person that makes a CRP application that they can contact the ATO to receive a progress update on the consideration of the application, and how this should be done.

We note that periodic progress updates may be unnecessary in some circumstances, for example, where a CRP application is progressed swiftly, or is raised by an internal ATO business line.

Final Draft Report Recommendation

ATO Response

Recommendation 4.1

The IGTO recommends that:

- a) *unless there are clear reasons why it would be inappropriate to do so, the ATO consult with the CRP Advisory Panel on each CRP candidate, providing a full analysis of the reasons for its view in each case, before a final decision as to the suitability of the candidate for exercising the CRP is made;*
- b) *where the ATO determines that it would be inappropriate to consult on a particular CRP Candidate, ensure that the decision is carefully considered, approved and documented; and*
- c) *when documenting the ATO's consideration of whether a proposed CRP modification is 'not inconsistent with the intended purpose or object of the provision', for consultation with the CRP Advisory Panel, the ATO document its conclusion of the policy intent before explaining its decision on whether the proposed CRP modification is or is not inconsistent with the intended policy intent.*

Recommendation 4.1(a) – Agree

The ATO agrees to consult with the CRP Advisory Panel and provide it with a full analysis of our views on the suitability of each candidate before a final decision is made, unless consultation with the Panel would be inappropriate in a particular case.

Recommendation 4.1(b) – Agree

The ATO agrees that any decision not to consult with the CRP Advisory Panel on a particular CRP candidate will be carefully considered, approved and documented.

Recommendation 4.1(c) – Agree

The ATO agrees to document its understanding of the intended purpose or object of relevant provision/s in any analysis that it provides to the CRP Advisory Panel.

Final Draft Report Recommendation

ATO Response

Recommendation 4.2

The IGTO recommends that:

- a) *the ATO CRP assessment processes are reviewed and revised, as necessary, to ensure that in scoping a CRP candidate there is a fulsome consideration of the potential scope of application and legislative parameters by the Secretariat with input from the Advisory Panel at the outset in accordance with section 370-5(3), including identifying opportunities for the Secretariat and the Advisory Panel to revisit and review the scope of a candidate which may fail the budget impact criterion, but otherwise satisfy all the other criteria for the exercise of the CRP; and*
- b) *the ATO, in consultation with the Treasury and the Department of Finance, consider what further information may be published about the CRP costing process generally as well as the costings of CRP candidates, both successful and unsuccessful, where the negligible budget impact criterion is considered.*

Recommendation 4.2(a) – Disagree

The ATO already carefully considers the parameters of each CRP candidate at the outset, to ensure it is assessed against the relevant statutory criteria (including the budget impact criterion) appropriately. This includes exploring alternative ways that issues raised by an applicant might meet the statutory criteria. For example, where an application effectively raises more than one issue and the likelihood of each of the issues meeting the statutory criteria differs, the ATO will treat and assess as discrete candidates.

If an issue raised affects all taxpayers, or a particular cohort of taxpayers, the ATO considers that this is the most appropriate basis on which it is assessed.

We note that it is highly unlikely that changes to the 'scope' of a candidate would have a material impact on the ability to quantify a revenue impact. Further, the ATO considers a modification to the law to address an issue only for some affected taxpayers is unlikely to be 'reasonable' (as required by paragraph 370-5(1)(b) of Schedule 1 to the *Taxation Administration Act 1953*, and may also be inconsistent with the intended purpose or object of the relevant provision (see paragraph 370-5(1)(a)).

Recommendation 4.2(b) – Agree in part

The ATO agrees to consult with Treasury and the Department of Finance to consider what further information about the CRP costing process generally may be published, noting this process applies to all Government costings, not just to costings undertaken as part of considering CRP candidates.

The ATO also agrees to consult with Treasury and the Department of Finance regarding information that may be published regarding costings of CRP candidates that have not met the negligible budget impact criterion. However, the ATO does not consider it necessary or appropriate to publish costing information for candidates where the CRP is exercised.

Final Draft Report Recommendation

ATO Response

Recommendation 4.3

The IGTO recommends that the ATO enhance its consultation in relation to the CRP by:

- a) developing guiding documents, protocols or charters to inform its consultation with the CRP Advisory Panel (including processes for refreshing or expanding the Panel), the Board of Taxation, other Government organisations and specific stakeholders;*
- b) leveraging its existing consultation and stewardship forums to consult on potential CRP candidates that are under consideration; and*
- c) publishing information about the consultation that the ATO undertakes in relation to each CRP matter published on the ATO website.*

Recommendation 4.4

The IGTO recommends that the ATO develop internal service standards for each main stage of the CRP process pathway and measure its performance against these service standards.

Recommendation 4.3(a) – Agree

The ATO agrees to develop a document that details its general approach to consultation with the CRP Advisory Panel, the Board of Taxation, as well as other Government organisations and specific stakeholders. The ATO also agrees to include information about refreshing or expanding Panel membership in this document.

Recommendation 4.3(b) – Agree in principle

The ATO agrees to consider how it can better utilise existing ATO consultation and stewardship forums to consult on future CRP candidates.

Recommendation 4.3(c) – Agree

The ATO agrees to publish high-level information about its consultation process for CRP candidates published on the ATO website, where public and/or targeted consultation has been undertaken (noting that public consultation is routinely undertaken for successful CRP candidates, but not for unsuccessful candidates).

Recommendation 4.4 – Agree in principle

The ATO agrees to develop internal 'best practice' service standards for each main stage of the CRP process, and measure its performance against these service standards. However, there will need to be some flexibility in any service standards to recognise the role of various external parties in the CRP process, and the fact the ATO cannot control the timing of the actions of those parties.

Final Draft Report Recommendation

ATO Response

Recommendation 5.1

The IGTO recommends that:

- a) the ATO update its policy to ensure that the CRP process is not to be suspended in favour of a law change process, such as the MTA, except in very limited circumstances, such as where the ATO has received advice from Treasury that the law change is likely to occur before the CRP process can be finalised; and*
- b) where the CRP process is suspended or not pursued, so that processes such as the MTA or legislative change can run their course, the ATO should implement procedures to monitor the progress of the relevant legislative change and, in consultation with the CRP Advisory Panel, reconsider the candidate for CRP actions where appropriate (that is, the initial time expectations are no longer realistic).*

Recommendation 5.1(a) – Agree

The ATO agrees to update and document its policy on the limited circumstances in which it is appropriate to suspend the CRP process in favour of a legislative amendment. The ATO notes that its policy will take into account factors beyond whether law change is likely to occur before the CRP process can be finalised.

Recommendation 5.1(b) – Agree in principle

In the limited circumstances where the CRP process is suspended or not pursued because legislative change is being progressed, the ATO agrees to monitor the progress of relevant legislative change.

If the ATO becomes aware that initial time expectations for legislative change are no longer realistic, the ATO agrees to consider whether to resume consideration of the CRP candidate via its ordinary process for handling CRP candidates.